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February 24, 2004

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: D.T.E. 03-121, NSTAR Electric Standby Rate Tariffs

Dear Secretary Cottrell:

Enclosed for filing please find an original and thirteen (13) copies of the Opposition of Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Company to NE DG Coalition's Motion to Dismiss in the above-referenced matter.

Thank you for your attention to this matter.

Very truly yours,

David S. Rosenzweig

Enclosures

cc: William Stevens, Hearing Officer
Service List

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Boston Edison Company Cambridge Electric Light Company Commonwealth Electric Company d/b/a NSTAR Electric	)	D.T.E. 03-121

CERTIFICATE OF SERVICE

I certify that I have this day served the foregoing documents upon the service list in the above-docketed proceeding in accordance with the requirements of 220 C.M.R. 1.05.

Stephen H. August, Esq.
Keegan, Werlin & Pabian, LLP
265 Franklin Street
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Dated: February 23, 2004

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Boston Edison Company Cambridge Electric Light Company Commonwealth Electric Company	)	D.T.E. 03-121

OPPOSITION OF BOSTON EDISON COMPANY, CAMBRIDGE ELECTRIC LIGHT COMPANY, AND COMMONWEALTH ELECTRIC COMPANY TO NE DG COALITION'S MOTION TO DISMISS

Submitted by:

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Dated: February 24, 2004

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OPPOSITION OF BOSTON EDISON COMPANY, CAMBRIDGE ELECTRIC LIGHT COMPANY AND COMMONWEALTH ELECTRIC COMPANY TO NE DG COALITION'S MOTION TO DISMISS

On February 12, 2004, the NE DG Coalition filed a motion to dismiss (the "Motion to Dismiss") the tariffs filed in the above-referenced proceeding by Boston Edison Company ("Boston Edison"), Cambridge Electric Light Company ("Cambridge") and Commonwealth Electric Company ("Commonwealth") (together, "NSTAR Electric" or the "Company"). For the reasons set forth below, the Motion to Dismiss is without merit and must be denied.

I. INTRODUCTION

On October 31, 2003, NSTAR Electric submitted tariffs, with supporting testimony and exhibits, to the Department of Telecommunications and Energy (the "Department") for cost-based standby rates for large and medium-sized commercial and industrial customers who have their own on-site, self-generation facilities. On January 16, 2004, the Company refiled the tariffs in this docket, thereby extending the period by which the Department could suspend the effective date of the rates. On January 29, 2004, the Department suspended the effective date of the tariffs until August 1, 2004, in order to investigate the propriety of the Company's proposed tariffs.

A public hearing and procedural conference was convened by the Department on February 10, 2004, at which time the Hearing Officer established a procedural schedule (Tr. A, at 89-90). Subsequent to the procedural conference, the Hearing Officer granted the petition to intervene of American DG, Inc.; Aegis Services, Inc.; OfficePower L.L.C.; Equity Office Properties Trust, Inc.; Northern Power Systems, Inc.; RealEnergy, Inc.; Tecogen Inc.; and Turbosteam Corporation (collectively, the "NE DG Coalition"). D.T.E. 03-121 (Hearing Officer Ruling dated February 13, 2004) at 5-6.

On February 12, 2004, the NE DG Coalition filed the Motion to Dismiss the proposed tariffs. As described below, even if there were any merit to the NE DG Coalition's criticisms of the tariffs (which there is not), none of the arguments would meet the standard necessary to dismiss the case before hearings and final briefing. The NE DG Coalition's motion fails to demonstrate that the Company has asserted no statement of facts which, if proven, would support the Company's request for approval of the tariffs. Indeed, the contrary is demonstrated by the Company's filing, which itself provides a comprehensive body of evidence, that, at a minimum, asserts facts that demonstrate that the Company's proposed tariffs are appropriate and should be approved as consistent with sound regulatory policy. In the context of a motion to dismiss, the Company has raised questions of fact that the Department must consider substantively and decide through the hearing process. Although the Department will, at the conclusion of this case, rule on a variety of factual and regulatory issues raised by the NE DG Coalition, as a matter of law, the Department must reject the NE DG Coalition's Motion to Dismiss.

II. STANDARD OF REVIEW

The Department's standard of review for ruling on a motion to dismiss is articulated in Riverside Steam & Electric Company, D.P.U. 88-123, at 26-27 (1988) ("Riverside"). Cambridge Electric Light Company/MIT, D.P.U. 94-101/95-36, at 10 (1995) ("Cambridge/MIT"). In determining whether to grant a motion to dismiss, the Department takes the assertions of fact included in the filings and pleadings as true and construes them in favor of the non-moving party. Riverside at 26-27. Dismissal will be granted by the Department only if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim. Id. In ruling on such a motion, the Department is also guided by the principles and procedures underlying the Massachusetts Rules of Civil Procedure. See 220 CMR § 1.06(c).

A complaint should not be dismissed because it asserts a novel theory of liability or even "improbable" facts. Municipal Light Co. of Ashburnham v. Commonwealth, 34 Mass. App. Ct. 162, 166, 608 N.E. 2d 743, 746, *review denied*, 616 N.E.2d 469, 415 Mass. 1102, *certiorari denied*, 114 S.Ct. 187, 126 L.Ed.2d 146, *citing* Coolidge Bank & Trust Co. v. First Ipswich Co., 9 Mass. App. Ct. 369, 370; 401 N.E. 2d 165 (1980). Jenkins v. Jenkins, 15 Mass. App. Ct. 934, 444 N.E. 2d 1301 (1983).

> It is familiar doctrine that a complaint can be dismissed for failure to state a claim for which relief can be granted only if a reading of the complaint establishes beyond doubt that the facts alleged, accepting them as true and drawing all inferences in the plaintiff's favor, do not add up to a cause of action which the law recognizes. The plaintiff has to plead itself out of court.

Id., citing Nader v. Citron, 372 Mass. at 98, 360 N.E.2d 870. Connerty v Metropolitan Dist. Commn., 398 Mass. 140, 143, 495 N.E. 2d 840 (1986). New England Insulation

Co. v.. General Dynamics Co., 26 Mass. App. Ct. 28, 29-30, 522 N.E.2d 997 (1988). It is fundamental that the burden on the party moving for dismissal is a heavy one. See Gibbs Ford, Inc. v. United Truck Leasing Corp., 399 Mass. 8, 13, 502 N.E. 2d 508 (1987).

III. ARGUMENT

The arguments advanced by the NE DG Coalition in its Motion to Dismiss, even if substantively valid (which they are not), do not justify dismissal of the case prior to hearing. The NE DG Coalition continually confuses a factual or policy disagreement with "unlawfulness." The fact that the Department may have decided an issue a certain way nearly a decade ago (and, indeed, in a variety of other ways over time), does not mean that a different proposal based on new facts in a wholly restructured industry is somehow unlawful and should be dismissed on its face. Department decisions are not "cast in stone" in perpetuity, and it is foolish to suggest that a new proposal that may deviate from certain past decisions is unlawful and subject to dismissal without substantive adjudication.

Many of the arguments raised in the Motion to Dismiss, as described below, will undoubtedly be the subject of evidentiary hearings and will have to be resolved by the Department based on the facts presented and sound policy determinations. However, the very existence of such factual and policy disputes means that they are not properly the subject of a motion to dismiss.

A. The Proposed Standby Rates Do Not Violate Any "Legal Standard" Established by the Department.

The first argument in the Motion to Dismiss is predicated on the erroneous proposition that the Department's decision in Cambridge/MIT established "legal standards for standby, maintenance and supplemental rates" (Motion to Dismiss at 4).

The NE DG Coalition makes the remarkable argument that NSTAR Electric is forever barred from "relitigat[ing] standards for standby rates decided in Cambridge/MIT..." because "...those standards are legally binding on Cambridge... and Boston Edison..., who were parties to the adjudicatory proceeding..." (id.).[1] This view of the Department's ratemaking process is without any basis.

NSTAR Electric agrees with one proposition advanced by the NE DG Coalition: nearly a decade ago, the Department did consider standby rates in Cambridge/MIT. It made a number of findings with regard to the proposal and the evidentiary record compiled in that case. Cambridge/MIT at 46-56. It analyzed the facts presented and the arguments made by the parties in the context of its regulatory policies and precedent — it did not state that the outcome is mandated forever as a matter of law or that it establishes inviolate legal standards for such rates.[2]

Although the Department may establish precedent in adjudicatory proceedings, parties are not precluded from revisiting issues in subsequent cases. The Supreme Judicial Court has made it clear that the Department's ratemaking procedure is an organic, evolving process. Companies subject to regulatory oversight are entitled to "reasoned consistency" in Department decisions, but "[t]his does not mean that every

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1 The NE DG Coalition is also wrong about Boston Edison. In point of fact, neither Boston Edison nor Commonwealth was a party in Cambridge/MIT. Commonwealth did not participate in the proceeding, and Boston Edison was granted non-party, limited participant status.

2 It is for this very reason that the Department in D.T.E. 02-38 has identified the need to reconsider the proper structure for standby rates on a going-forward basis. Order Opening Investigation into Distributed Generation, D.T.E. 02-38, at 2 (2002) (The Department notes lack of uniformity and uncertainty in back-up rates as a basis to investigate the appropriate method for calculation of standby rates). The unsettled status of policies for designing standby rates for distribution companies in the post-Restructuring world in Massachusetts, as acknowledged by the Department, completely belies the NE DG Coalition's basic claim that prior precedent legally bars the Department from reviewing NSTAR Electric's proposed tariffs in this proceeding.

decision of the Department in a particular proceeding becomes irreversible in the manner of judicial decisions constituting res judicata, but neither does it mean that the same issue arising as to the same party is subject to decision according to the whim or caprice of the Department every time it is presented...". Boston Gas Co. v. Dept. of Public Utilities, 367 Mass. 92, 104-105.[3]

The NE DG Coalition then goes on to describe three areas in which, it claims, NSTAR Electric's proposal deviates from what was approved in Cambridge/MIT, which purportedly renders it "unlawful" (Motion to Dismiss at 4-9). The NE DG Coalition states that NSTAR Electric's standby rates are unlawfully based on contract demand, citing language from Cambridge/MIT (id. at 4-5). However, the NE DG Coalition cites to no Department finding that such a rate is "unlawful" and conveniently omits the Department's operative statement that "[t]he Company has presented no new evidence or argument that would persuade the Department to alter the policy on this matter." Cambridge/MIT at 50. Mr. LaMontagne's prefiled testimony addresses the issue of cost-causation, rate design and contract-demand-based rates at length (Exh. NSTAR-HCL-1, at 11-19). The NE DG Coalition is free to disagree with these facts, as it has in its Motion to Dismiss (Motion to Dismiss at 4-6). However it may wish to disagree, the NE DG Coalition has offered no support for its proposition that "NSTAR Electric can prove no set of facts in support of standby charges based on contract demand" (id. at 6).

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[3] The cases cited by the NE DG Coalition in support of the general proposition that NSTAR Electric is precluded from relitigating issues are inapposite. In Tuper v. North Adams Ambulance Service, Inc. 428 Mass. 132 (1998), Stowe v. Bologna, 415 Mass 20 (1993) and New England Telephone, D.P.U. 92-176 (1992), parties were precluded from relitigating cases because they dealt with the same facts and the same parties. None dealt with a different regulatory proposal made nearly a decade later and based on different facts.

Moreover, contrary to the NE DG Coalition's contention, in Cambridge/MIT, the Department approved standby service rates that include a monthly demand charge for Cambridge for generation and off-system transmission capacity. Id. at 52-53.

> The costs associated with [generation and off-system transmission] investments and commitments are long-lived in nature and reflect the Company's long-range planning decisions. As such, these costs are not incurred on a daily or an hourly basis, nor does the Company contract for capacity on a daily or hourly basis.

Id. at 52.[4] It is this same rationale with respect to investments in distribution facilities that supports the design of the Company's proposed standby rates. Indeed, the Department's policies with respect to standby rates have resulted in approval of annual distribution contract demand charges in proposed standby rates for Eastern Edison Company and Boston Edison. Eastern Edison Company, D.P.U. 92-148, at 36-37 (1992); Boston Edison Company, D.P.U. 92-92, at 58-63 (1992). In each of these cases, the Department allowed annual distribution contract demand charges for standby rates based on the appropriate recovery of a utility's distribution costs. Accordingly, the incorporation of an annual distribution contract demand charge is clearly not "unlawful."

Similarly, the NE DG Coalition is incorrect that it is "unlawful" to develop standby rates based on the costs that are reflected in rates for all-requirements customers (Motion to Dismiss at 6-8). Although the NE DG Coalition disagrees with factual assertions included in Mr. LaMontagne's prefiled testimony, these disagreements prove

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[4] It should be noted that any demand charge is essentially a demand ratchet. The issue, therefore, is not whether a demand ratchet is appropriate, but whether it should be applicable over an annual period based on the Standby Contract Demand or on a monthly basis determined on the highest use during the month. The nature of standby customers' intermittent actual use of the Company's distribution system (and the associated reduced billing determinants) requires that an annual demand charge be applied in order to recover all costs incurred to provide standby service on an immediate "on demand" basis.

only that there is a factual dispute that must be resolved. After reciting the testimony of Mr. LaMontagne regarding how the Company plans for and builds distribution and transmission facilities, the Motion to Dismiss states the following:

> These claims are patently incorrect. NSTAR Electric does not plan or build distribution facilities to serve standby customers. It plans and builds facilities to serve all-requirements customers. When an existing all-requirements customer installs on-site generation, there is no infrastructure investment. Any transmission or distribution facilities that might be needed to serve the standby customer are already in place. In other words NSTAR Electric sized its transmission and distribution system to meet the load requirements placed on the system. On-site generation does not add a load burden to the NSTAR Electric transmission and distribution facilities. Indeed, by installing on-site generation, the standby customer removes load and thereby makes available existing facilities to service other customers. This allows NSTAR Electric to defer or postpone additional capital investment in its transmission system.

Id. at 7. Such unsworn statements do not constitute evidence or any other legal basis for dismissing Mr. LaMontagne's assertions. At best, they represent a factual disagreement with the evidence that the Company has proffered in this case. This factual dispute by itself eliminates any legitimate basis for dismissal of the case.

Finally, the NE DG Coalition claims that the proposal to recover distribution and transmission costs through demand charges is "unlawful" because it deviates from what was approved in Cambridge/MIT (Motion to Dismiss at 8-9). Again, the NE DG Coalition recites and disagrees with the evidence proffered by Mr. LaMontagne, who explains in detail the cost-causation and rate-design principles used to develop and design the Company's proposed rates (Exh. NSTAR-HCL-1, at 11-19, 23-25). NE DG Coalition's labeling of his claim as "preposterous" does not substitute for record evidence that will prove or disprove the factual assertions. As a matter of law, the presence of this factual dispute removes any legitimate basis for dismissal.

B. The Proposed Standby Rates Do Not Violate Department or Federal Regulations.

The NE DG Coalition asserts that the proposed tariffs violate Department regulations relating to Qualifying Facilities ("QFs") and the regulations promulgated by the Federal Energy Regulatory Commission ("FERC") (Motion to Dismiss at 9-14). NSTAR Electric's tariffs do not conflict with any applicable state or federal law, and to the extent that the referenced regulations would apply to these tariffs, resolution of such matters would require the Department to make a factual determination through the hearing process. The arguments made by the NE DG Coalition do not constitute grounds for dismissal.

According to the NE DG Coalition, customers have the right under Department regulations to take service under rate schedules available to all-requirements customers (id. at 9, citing 220 CMR 8.06(2)). The NE DG Coalition claims that, if it is NSTAR Electric's intent "to deny customers with on-site generation the right to take service under the rates available to all-requirements customers, the proposed rates violate the Department's regulation" (id. at 12). Based on this faulty premise, the NE DG Coalition claims that the filing should be dismissed (id.). The NE DG Coalition's argument is without merit.

The regulation cited by the NE DG Coalition states:

> (2) Where it is possible for a Qualifying Facility or On-Site Generating Facility to receive power under the applicability clauses of more than one rate schedule, the Qualifying Facility or On-Site Generating Facility may choose the rate schedule which it will be served.

New standby customers do not, however, qualify under the applicability clause of the Company's rates otherwise applicable to all-requirements customers. Were this to be so, there would be no need for the Company to propose standby rate tariffs – such customers

would simply be able to take service under the rates available to all-requirements customers. Instead, new standby customers qualify for the standby service only under the applicability provisions of the Company's proposed standby service tariffs. The Company proposed separate standby tariffs in this case specifically because customers taking such service are not all-requirements customers, and therefore, these customers have different usage characteristics pursuant to which the Company must recover its distribution costs.

Second, as acknowledged by the NE DG Coalition, the cited Department regulations do not apply to all on-site generation (id. at 9-10 n.4). The regulations apply to QFs and certain extremely small on-site generating units (to which the proposed tariffs do not apply). On the other hand, the proposed tariffs apply to QFs and non-QFs, and to generators above the 60 kilowatt threshold. Thus, even if the tariffs violated the QF regulations (which they don't), it wouldn't be grounds for dismissal. More importantly, the cited regulation does not provide the "right" suggested by the NE DG Coalition. In proposing 220 CMR 8.06(1), the Department explained the intent of the provision, as follows:

> This section would require utilities to establish rate schedules under which power would be provided to QFs. It is completely new and replaces a previous section of the same heading. The language in this section clarifies the intent of the Department. The new section would require utilities to provide power to QFs under rate schedules which are non-discriminatory with respect to a customer's sources of power. The section would allow utilities to establish rates based on voltage levels and load patterns which are applicable to all similarly situated customers and are designed to reflect the costs a utility incurs in serving the types of load which characterize QFs.

D.P.U. 84-276-A at 78 (1986). Thus, the provision is not intended to permit customers to avoid approved cost-based standby rates, but to ensure that such rates: (i) are designed to

recover the costs associated with providing such service; and (ii) are non-discriminatory to all customers. The Department's need to consider whether a proposed rate conflicts with regulations adopted in accordance with the Public Utility Regulatory Policies Act of 1978 ("PURPA") was addressed by the Department in Cambridge/MIT in disposing of a similar motion:

> PURPA gives state commissions wide latitude regarding the implementation of the substantive provisions of this act, provided that they do not impose conditions that conflict, or are otherwise inconsistent, with PURPA. 16 U.S.C. s. 824a-3; See FERC v. Mississippi, 456 U.S. at 751. Therefore, the Department has authority to determine whether the rates for the sale of electricity to QFs are just and reasonable, in the public interest, and nondiscriminatory. *However, such a determination is factual in nature and cannot be determined as a matter of law.* Accordingly, MIT's Motion for Partial Summary Judgment based on this argument is denied.

Cambridge/MIT at 15-16 (emphasis added). See Massachusetts Institute of Technology, 74 FERC ¶ 61,221 (1996) (the issue of whether a tariff discriminates against QFs is a fact-based determination for the Department to make). See also Massachusetts Institute of Technology v. Massachusetts Department of Public Utilities, 941 F.Supp. 233 (D. Mass. 1996) (Federal Court lacks jurisdiction to review a challenge to the Department's implementation of PURPA).

Mr. LaMontagne's testimony describes how the proposed rate-design avoids cross-subsidization and is based on the costs that are incurred to provide standby service to customers (Exh. NSTAR-HCL-1, at 11-19). Cost-based rates such as those proposed by the Company are precisely the approach that avoids the type of discrimination that would conflict with the Department's QF regulations and the requirements of PURPA. For the reasons set forth in Mr. LaMontagne's testimony, the proposed tariffs are just, reasonable, in the public interest and nondiscriminatory. If the NE DG Coalition wishes to challenge Mr. LaMontagne's assertions or present contrary evidence, it can do so

during the hearing process, but the resolution of such factual disputes cannot be accomplished, as a matter of law, through a motion to dismiss. Moreover, under no circumstances would the NE DG Coalition's disagreement with the Company constitute a legal basis to reject the proposed tariffs out of hand.

The NE DG Coalition's arguments about federal QF regulations (Motion to Dismiss at 12-14) share the same infirmities. First, as stated above, the NE DG Coalition acknowledges, as it must, that the FERC regulations do not apply to non-QFs (id. at 12, n5). Thus, the regulations cannot possibly be a legal bar to consideration of the proposed tariffs for non-QFs. But even where the FERC regulations have applicability, they present no legal impediment to approval of the proposed tariffs.

The NE DG Coalition cites 18 C.F.R. § 292.305(c)(1), which states that standby service:

> (1) Shall not be based upon an assumption (unless supported by factual data) that forced outages or other reductions in electric output by all qualifying facilities on an electric utility's system will occur simultaneously, or during the system peak, or both....

The NE DG Coalition argues that the Company's proposed rates fail this test (Motion to Dismiss at 13). However, this is an argument built upon conclusions only (i.e., there are no facts supporting NE DG Coalition's position in the record), rather than legal principles. At this point in time, the NE DG Coalition's only "facts" are the opinions offered by its attorneys' arguing how costs are incurred on the Company's system (id.). Attorney argument cannot take the place of expert testimony, and a motion to dismiss cannot replace the adjudication of facts.

Notably, the FERC rule provides that utilities may refute the assumption regarding the occurrence of facility outages on the basis of factual data. *Small Power*

Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 18 C.F.R. Part 292, 45 Fed. Reg. 12214, at 12229 (February 25, 1980). In explaining this rule, the FERC stated that the data that is used to refute the assumption "need not be in the form of empirical load data." Id. In other words, the Company is required to provide only a credible refutation of the assumption. The Company's witness, Mr. LaMontagne, provides a comprehensive discussion of this issue in his testimony, and concludes that "the distribution system must be constructed in the same manner and configuration (and with the same materials) whether or not a particular customer on the distribution system is able to generate its own electricity" (Exh. NSTAR-HCL-1, at 30).[5] Most importantly, under 18 CFR § 292.305, the FERC requires a just and reasonable standby rate that "contemplates formulation of rates on the basis of traditional ratemaking (*i.e.*, cost-of-service) concepts." 45 Fed. Reg. 12214, at 12228. Mr. LaMontagne's prefiled direct testimony establishes the factual foundation for the actual costs that will be incurred by the Company to serve standby customers under the Company's proposed standby rates (*i.e.*, the proposed tariffs are based on cost-of-service principles) (Exh. NSTAR-HCL-1, at 11-20). Mr. LaMontagne's testimony also establishes that there is no diversity at this point among the outages experienced by standby customers or the circuits serving these customers. Exh. NSTAR-HCL-1, at 19. Therefore, the Company has presented facts that support the approval of the proposed tariffs consistent with the requirements of PURPA.

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[5] Section 210(f) of PURPA delegates to state public utility commissions the authority to implement the PURPA rules prescribed by FERC. See MIT v. Department of Public Utilities, 941 F. Supp. 233, 235 (1996). Accordingly, it is for the Department to decide whether, on a factual, policy and legal basis, NSTAR Electric's proposed standby rates comply with the requirements of PURPA.

The assertion by the NE DG Coalition that the Company's proposed standby tariffs are somehow "discriminatory" toward self generators is without merit. PURPA's non-discrimination provisions require that rates to QFs not be discriminatory against such facilities in comparison to rates to other customers. At the same time, PURPA contemplates rates that should be based on traditional cost-of-service concepts. PURPA does not require electric utilities to discriminate "in favor of" QFs; it requires only that electric utility backup rates not discriminate "against" QFs. 45 Fed. Reg. 12214, at 12228. FERC regulations provide that rates to QFs are not considered to be discriminatory to QFs "to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics." 18 C.F.R. § 292.305(a)(2). The Company's standby rates clearly comply with this requirement.

As the legislative history from PURPA makes clear:

> The conferees use the phrase "not discriminate against cogenerators or small power producers" because they were concerned that the electric utility's obligations to purchase and sell under this provision might be circumvented by the charging of unjust and non-cost based rates for power solely to discourage cogeneration or small power production. This phrase should not be construed to permit discrimination against the electric consumers of an electric utility in formulating rates under this provision. The provisions of this section are not intended to require the rate payers of a utility to subsidize cogenerators or small power producers.

H.R. REP. No. 95-1750, at 98 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 7832.

The NE DG Coalition also claims that tariffs violate FERC regulation 18 C.F.R. § 292.305(c)(2), which requires that maintenance rates:

> (2) Shall take into account the extent to which scheduled outages of the qualifying facilities can be usefully coordinated with scheduled outages for the utility's facilities.

Not only do the NE DG Coalition's arguments on this regulation fail for the same reasons cited above, but NSTAR Electric no longer owns or operates generation facilities and

therefore does not have "scheduled outages." In any event, the proposed rate design for supplemental power will permit self-generators to minimize costs by scheduling planned maintenance in off-peak hours. The proposed rates also provide full credits during an outage for the level of contract demand already paid for by the customer (Exh. NSTAR-HCL-1, at 28; Exh. NSTAR-HCL-5).

C. The Alternative Relief Proposed by the NE DG Coalition Would Violate the Rights of NSTAR Electric Under the Massachusetts General Laws.

The NE DG Coalition proposes that, in the event that the Department does not dismiss NSTAR Electric's tariffs, it nonetheless should: "(1) issue a finding that NSTAR Electric's filing is not a proper tariff; and (2) consider the filing as a petition for generic investigation of standby rates pursuant to the Department's order in D.T.E. 02-38" (Motion to Dismiss at 16). This proposal is unsupported by precedent and would violate NSTAR Electric's rights pursuant to the Massachusetts General Laws.[6]

In support of the argument for alternative relief, the NE DG Coalition cites two cases. Neither is on point. The NE DG Coalition points to the Department's decision in New England Telephone and Telegraph Company, D.P.U. 85-85 (1985) for the proposition that the Department dismissed a tariff filing that would have removed restrictions on the resale of telecommunications services. According to the NE DG Coalition, the Department dismissed the tariff because it "was still examining

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[6] As stated above, the NE DG Coalition's alternative remedy of considering standby rate principles in a generic proceeding instead of in this case discloses the fundamental flaw to its Motion to Dismiss. If the Company's proposed standby rates are, as the NE DG Coalition claims, so legally flawed that dismissal is warranted, they would be no more capable of consideration in a generic proceeding. The fact of the matter is that the Company's proposal is grounded in fact and sound policy and consistent with the standards for cost-based rates under PURPA.

general policy issues related to IntraLATA competition in a generic docket" (id.). What the NE DG Coalition omitted from its citation was the key finding by the Department "...that where intraLATA competition is not currently authorized, and there are therefore no potential buyers of intraLATA service, a tariff containing rates for the resale of such services is at this time unnecessary." D.P.U. 85-85, at 6. Thus, the Department didn't dismiss the tariff in order to decide the same issues in a generic proceeding, it dismissed the tariff because no one could purchase the offered service.[7]

The dismissal in D.P.U. 85-85 is a far cry from what is being proposed in this case. Here, there is no regulatory policy that prohibits customers from self-generating or purchasing standby service from distribution companies. NSTAR Electric has a statutory right to file tariffs with the Department in accordance with G.L. c. 164, § 94. The Department has the ability to investigate such rates, but it has limited statutory rights to suspend the implementation of a tariff filed by a regulated company. G.L. c. 164, § 94; G.L. c. 25, § 18. The Department long ago acknowledged the limits of its authority in this regard in response to a motion to dismiss a portion of a Boston Edison rate case:

> The Attorney General's contention that the Pilgrim II cost recovery issue should have been severed is based on his perception that General Laws Chap 164, § 94, and Chap 25, § 18, are inapplicable to the Pilgrim II expense. The sole authority which he cites in support of this statutory construction is his assertion that it is impossible to examine adequately both the Pilgrim II expenditures and the other rate case issues during the six-month suspension period. He opines that the [D]epartment should have ruled that the complexity and magnitude of the Pilgrim II cost

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[7] The NE DG Coalition's passing reference to the Department's interlocutory decision in D.P.U. 94-50 (Motion to Dismiss at 16) is off the mark. In that case, the Department dismissed a tariff for alternative regulation filed by New England Telephone and Telegraph Company because "the filing is not a tariff filing." D.P.U. 94-50, at 14 (Interlocutory Order dated May 24, 1994). The NE DG Coalition makes no argument that the Company's filing of standby rates in this case "is not a tariff filing."

recovery issue rendered it extraordinary, and that due process therefore required that it not be subject to the usual six-month suspension period.

The [A]ttorney [G]eneral's argument is grounded on a rather novel statutory loophole which simply does not exist. General Laws Chap 25, § 18, is quite specific on the time period within which the [D]epartment must decide a rate request:

> . . . the [D]epartment shall have no authority to suspend the effective date of any rate, price, or charge set forth in any schedule filed . . . by any gas or electric company under the provisions of § 94 of Chap 164 for a period longer than six months.

The intent of the statute is clear. The [D]epartment must rule on rate increases within six months of their proposed effective date. It is given absolutely no independent discretion to lengthen the suspension period. Neither the statute itself nor any associated case law provides for an exemption from the six-month suspension period where there are complex issues to be decided in a particular case.

Boston Edison Company, D.P.U. 906, at 166-167 (1982).[8] Thus, the Department has no statutory authority to refuse to consider the tariff and investigate the issue of standby rates in D.T.E. 02-38.[9]

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[8] See also AT&T Communications of New England, D.P.U. 85-137, at 9 (1985), where the Department stated:

> An agency's right to reject a filing summarily is limited. It may do so where the filing is either patently deficient in form or a nullity in substance, or where the deficiencies in a company's filing substantially prejudice the ability of the Department to proceed or substantially prejudice the due process rights of other parties. Massachusetts Electric Company, D.P.U. 136, pp. 7-8 (1980), *citing* Municipal Light Boards v. Federal Power Commission, 450 F.2d 1341, 1345 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); Fitchburg Gas and Electric Light Company, D.P.U. 84-145-A (1985); New England Telephone and Telegraph Company, D.P.U. 84-267 (1985); Dedham Water Company, D.P.U. 85-119 (1985).

[9] It must be noted that it has been nearly two years since the Department opened its generic proceeding and the important issue of standby rates has not moved beyond the Department's initial policy goals articulated in the order opening the proceeding. D.T.E. 02-38, at 4 (June 13, 2002).

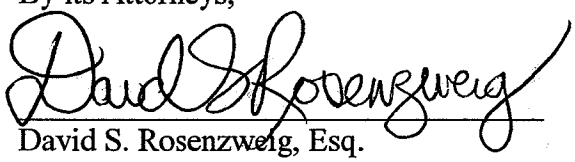
IV. CONCLUSION

For all of the foregoing reasons, the NE DG Coalition has not established a legal basis for the Department to grant it a dismissal with respect to the Company's proposed tariffs. The Motion to Dismiss must be denied.

Respectfully submitted,

BOSTON EDISON COMPANY
CAMBRIDGE ELECTRIC LIGHT COMPANY
COMMONWEALTH ELECTRIC COMPANY

By its Attorneys,



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